Supreme Court, U.S.
FILED
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No. 92-415

In the Supreme Court of the United States

OCTOBER TERM, 1992

GULF CONTRACTING, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when the Armed Services Board of Contract Appeals concludes that an expert witness's testimony is "inherently biased" and "totally unreliable," the Board must nevertheless accept the expert's analysis because the expert was not cross-examined by the opposing party.

2. Whether, under 32 C.F.R. 15-205.17 (1975), a government contractor is entitled to recover interest on borrowings.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a, is unreported. The opinion of the United States Claims Court, Pet. App. 2a-17a, is reported at 23 Cl. Ct. 525. The opinions of the Armed Services Board of Contract Appeals, Pet. App. 18a-86a, are reported at 90-1 B.C.A. (CCH) ¶ 22,393; 89-2 B.C.A. (CCH) ¶ 21,812; and 84-2 B.C.A. (CCH) ¶ 17,472.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1992. The petition for a writ of certiorari was filed on September 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, petitioner Gulf Contracting, Inc., (Gulf) entered into a contract with the Army Corps of Engineers (Corps) for the construction of barracks at Fort Gordon, Georgia. Pet. App. 3a. Petitioner Hughes Masonry Company, Inc., acted as Gulf's masonry subcontractor for the project. *Ibid.* Petitioners completed the project 147 days after the scheduled completion date. *Ibid.*

2. While petitioners were building the complex, the Corps directed petitioners to employ a particular welding procedure. Pet. App. 5a. Petitioners complied, but subsequently filed a claim against the United States contending that the contract did not require this welding procedure. *Id.* at 76a. Petitioners sought compensation for various costs incurred in complying with the Corps' directive, including: (1) direct costs of performance; (2) costs associated with delayed completion, allegedly caused by the welding change; and (3) interest on borrowing allegedly attributable to the change. *Id.* at 8a, 43a-44a. The contracting officer denied petitioners' claim, and petitioners appealed to the Armed Services Board of Contract Appeals (ASBCA). *Id.* at 44a.

3. The ASBCA held that the Corps' directive was "the equivalent of a change order" and caused petitioners "to perform in a manner different than [they] had planned." Pet. App. 80a. The ASBCA thus awarded petitioners direct costs incurred as a result of the Corps' directive, but denied petitioners' claim for delay-related costs and interest. *Id.* at 72a.

a. The ASBCA found the Corps' directive regarding the welding procedure had not caused any delay in petitioners' completion of the project. Pet. App. 68a. The ASBCA accordingly disallowed any compensation for

delayed completion. In reaching this conclusion, the ASBCA considered analyses offered by experts for both petitioners and the government regarding the cause of the delay. The ASBCA found the government expert's explanation of the delay more credible, *id.* at 67a-68a, concluding that petitioners' expert was "inherently biased," *id.* at 66a, and that his analysis was "totally unreliable." *Ibid.*

b. On the question of interest, the ASBCA held that Armed Services Procurement Regulations (ASPR) 15-205.17, 32 C.F.R. 15-205.17 (1975), which provided that "[i]nterest on borrowings (however represented) * * * [is] unallowable," precluded recovery by petitioners. Pet. App. 71a.

4. Petitioners appealed to the United States Claims Court under the Wunderlich Act, 41 U.S.C. 321, 322. Pet. App. 6a. The court granted summary judgment for the government, holding that the ASBCA's rejection of the analysis offered by petitioners' expert witness was supported by substantial evidence, *id.* at 9a-10a, and that ASPR 15-205.17 precluded petitioners' recovery of interest on borrowings. Pet. App. 13a-14a. The court further held that, even apart from ASPR 15-205.17, petitioners were not entitled to recover interest because they had not proved that the Corps' directive required them to borrow the money in question. Pet. App. 14a-15a.

5. The Federal Circuit affirmed the Claims Court's decision without opinion. Pet. App. 1a.

ARGUMENT

The decisions of the Federal Circuit, the Claims Court, and the ASBCA are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The ASBCA concluded that the analysis offered by petitioners' expert witness on the delay question was "inherently biased" and "totally unreliable." Pet. App. 66a. The ASBCA supported this conclusion with specific findings of fact related to the expert's analysis, including findings that his background was suspect, *id.* at 54a, his methodology was flawed, *id.* at 56a, and his analysis "leaped from one unsupported conclusion to another." *Id.* at 59a. The lower courts' affirmance of this finding was correct.

a. Petitioners argue that the ASBCA was required to adopt their expert's analysis, notwithstanding its deficiencies, because the government's trial counsel did not cross-examine the expert on the facts or data underlying it. Pet. 11. Federal Rule of Evidence 705, on which petitioners apparently base this argument, states that an expert may give an opinion without disclosing the underlying facts or data on which he bases that opinion, unless the court requires otherwise or the expert is questioned on cross-examination about the underlying facts or data. But, contrary to petitioners' contention, the Rule does not require a trial court to accept an expert's testimony, regardless of how incredible it is, simply because the opposing party does not cross-examine the expert. Furthermore, such a rule would make no sense: If experts testified for both parties, and neither party cross-examined the other party's expert, then the court would be required to accept *both* experts' opinions, even if they directly contradicted one another. *

* The cases on which petitioners rely, Pet. 14, do not support their argument. *White* v. *Chicago, B. & Q. R.R.*, 417 F.2d 941, 946 (8th Cir. 1969), concerned the issue of questions raised for the first time on appeal. *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980), cert. denied, 450 U.S. 918 (1981), discussed Rule 705, but

b. Petitioners do not challenge the ASBCA's specific findings concerning the delay question; such a challenge would, in any event, be fruitless. This Court has long held that in deciding questions of fact upon which expert witnesses differ, it is the task of the trier of fact to weigh the care and accuracy with which the opposing experts have reached their respective conclusions and make a judgment as to which conclusions to accept. *North Dakota* v. *Minnesota*, 263 U.S. 365, 385-386 (1923); cf. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985) (credibility determinations are made by factfinder and rarely are to be disturbed on appeal). Here, the ASBCA, as trier of fact, reached an amply supported conclusion that the analysis advanced by petitioners' expert was unreliable. Furthermore, two reviewing courts found the ASBCA's decision supported by substantial evidence; this Court generally does not review questions of substantial evidence. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

2. Petitioners also maintain that they are entitled to interest paid on money they borrowed during the contract's performance. Pet. 15-18. The ASBCA and the courts below correctly rejected this claim as well.

a. At the time petitioners entered into the contract at issue, ASPR 15-205.17 provided: "Interest on borrowings (however represented), * * * [is] unallowable except for interest assessed by State or local taxing authorities under the conditions set forth in 15-205.41." 32 C.F.R. 15-205.17 (1975). The ASBCA and the Claims Court held

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did not in any way suggest that the Rule requires a court to accept facially defective expert testimony if opposing counsel chooses to forgo cross-examination.

that this regulation applies to petitioners' claim and bars the interest they seek. Pet. App. 13a-14a, 71a. Petitioners argue that the regulation should be construed to bar "recovery of general business costs incurred in gathering capital to fund a business venture," but not "specific interest expenses which occur as a direct cost of Government contract changes." Pet. 16. By its express terms, however, ASPR 15-205.17 bars interest "however represented." That resolves the matter. See *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992).

The cases on which petitioners rely, Pet. 15, do not support their restricted construction of the regulation. As the Claims Court recognized, Pet. App. 14a n.4, decisions that have awarded interest did not involve contracts governed by ASPR 15-205.17 or any similar regulation expressly precluding recovery of interest. See *Dravo Corp.* v. *United States*, 594 F.2d 842, 846-850 (Ct. Cl. 1979); *Framlau Corp.* v. *United States*, 568 F.2d 687, 694-695 (Ct. Cl. 1977); *Singer Co., Librascope Div.* v. *United States*, 568 F.2d 695, 718-720 (Ct. Cl. 1977); *Bell* v. *United States*, 404 F.2d 975, 984 (Ct. Cl. 1968).

b. Petitioners' argument based on the Takings Clause, Pet. 15-18, is equally infirm. Petitioners contend that a court may require the government to pay interest when the government has taken private property. Pet. 17. However, 28 U.S.C. 2516(a) requires explicit statutory or contractual authorization for interest awards against the United States; and there is no such authorization here. Furthermore, even assuming petitioners are correct on that point, they do not argue, see Pet. 16-18, nor do they have any basis for arguing, that the government's action in this case constituted a taking of private property.

c. Even if the contract, this regulation, or the Constitution were construed to require an award of interest where the borrowings were caused by the government, petitioners' claim would still be precluded. The Claims Court made a factual finding that petitioners had not established that the Corps' directive necessitated any borrowing. Pet. App. 14a-15a. That finding, supported by substantial evidence, provides a separate and independent basis for the lower courts' ruling. Further review of this question is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992